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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE STATIC RANDOM ACCESS MEMORY (SRAM) ANTITRUST LITIGATION	Case No.: M:07-cv-1819 CW MDL No. 1819
This Document Relates To: All Indirect Purchaser Actions	**DEFENDANTS' OBJECTIONS TO INACCURATE CITATION TO AUTHORITIES AND EVIDENCE IN INDIRECT PURCHASER PLAINTIFFS' RESPONSE TO DEFENDANTS' POST-CLASS CERTIFICATION HEARING MEMORANDUM**
	Judge: Hon. Claudia Wilken

Defendants hereby object to the inaccurate citation to authorities and evidence in Indirect Purchaser Plaintiffs' Response to Defendants' Post-Class Certification Hearing Memorandum. While there are numerous examples of such inaccurate citations, Defendants only highlight herein the most significant and egregious examples:

OBJECTION to Plaintiffs' Citation to *In re First Am. Corp. ERISA Litig.* and *Skaff v. Meridian N. Am. Beverly Hills, LLC*: Misstates the Cases

Plaintiffs' Citation at Page 2, lines 8–10: "At the pleading stage, 'general factual allegations of injury resulting from defendant's conduct may suffice.'" (citing *In re First Am. Corp.*, 2009 WL 2430879, at *3 (quoting *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007)).

Why This is a Misstatement: In *Skaff*, the Ninth Circuit explained that it limited its consideration to the pleadings only "[b]ecause the district court based its conclusion that there was no standing when the initial complaint was filed on the district court's assessment of the language of the complaint." (*Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 839-40 (9th Cir. 2007).) We are not limited to the pleadings in this case because merits discovery is almost complete and both sides have presented evidence on class certification. Thus, *Skaff* is irrelevant.

Plaintiffs Citation at Page 2, lines 10–11: "[A]t the class certification stage, plaintiffs 'may show standing through the allegations in their consolidated complaint.'" (citing *In re First Am. Corp. ERISA Litig,*, 2009 WL 2430879, at *3.)

Why This is a Misstatement: Plaintiffs omitted the dispositive first clause of the sentence quoted. The portion of the sentence Plaintiffs omitted follows with emphasis: ***"[B]ecause substantial merits-based discovery has yet to begin***, the [plaintiffs] may show standing through the allegations in their consolidated complaint." (*In re First Am. Corp. ERISA Litig.*, No. SACV 07-1357 JVS (RNBx), 2009 WL 2430879, at *3 (N.D. Cal. July 27, 2009) (emphasis added).) The omission is material because merits discovery has been ongoing for over two years in this case and both sides presented a substantial amount of evidence related to class certification. *In re First Am. Corp. ERISA Litig.* also stated that standing is a threshold issue to be addressed before Rule 23. (*Id*. at *3

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("The Court takes up the threshold issue of standing before turning to the requirements under Rule 23.")

OBJECTION to Plaintiffs' Citation to *Kohen v. Pacific Investment Management Co.* (PIMCO): Irrelevant

Plaintiffs' Citation at Page 3, lines 11–17: "Judge Posner's recent decision in *Kohen v. Pacific Investment Management Co.*, 571 F.3d 672, 676 (7th Cir. 2009), is also instructive: '[Defendant] argues that before certifying a class the district judge was required to determine which class members had suffered damages. But putting the cart before the horse in that way would vitiate the economies of class action procedure; in effect the trial would precede the certification. It is true that injury is a prerequisite to standing. But as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied.'"

Why This is a Misstatement: Judge Posner in *PIMCO* went on to state that "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant . . . ." *Id*. at 677. Defendants in this case have presented evidence that a great many persons in the putative class suffered no injury.

OBJECTION to Plaintiffs' Citation to Evidence Pertaining to Ascertainability: Misstates the Evidence

Plaintiffs Citation at Page 4, line 3 through Page 5, line 2: Citation to confidential third-party data for the proposition that proposed class representatives from California, Arizona, Florida, Michigan, New York, Pennsylvania, and Rhode Island purchased Research In Motion, Ltd.'s (RIM) Blackberry Smartphones containing Defendants' SRAM during the [proposed] class period. Citation to certain confidential documents for the proposition that proposed class representatives from Nevada, Utah, and West Virginia purchased D-Link products containing Defendants' SRAM during the [proposed] class period. Citation to confidential third-party information for the proposition that proposed class

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representatives from Arizona, Minnesota, and Nevada purchased products containing Defendants' SRAM.

Why This is a Misstatement: Plaintiffs create the false impression that these third parties purchased all of their SRAM from Defendants. This is false. (*See* Exhibit 45 to Micheletti Declaration, third page ending in Bates No. 000003; Burtis Ex. 11; Exhibit 59 to Micheletti Declaration, DE 756-7, page 11:28-12:6.) Plaintiffs use this false impression to support a fallacious argument: Companies A and B purchased some of their SRAM from Defendants. Companies A and B sold products containing SRAM to proposed class representatives. Therefore, proposed class representatives purchased products containing Defendants' SRAM. Plaintiffs do not have any support for their thesis because they do not have evidence that these third parties purchased all of their SRAM from Defendants during the proposed class period. Plaintiffs should be also be precluded from making these arguments because they have refused to produce their products for inspection. (Ex. KK, Plaintiffs' Objections to NEC Defendants' Request for Inspection.)

OBJECTION to Plaintiffs' Citation to *In re Tobacco II* Cases: Misstates the Case

Plaintiffs' Citation at Page 8, line 18 through Page 9, line 4: "The California Supreme Court in *In re Tobacco II Cases*, 46 Ca1.4th 298, 324 (2009) expressly held that under the *substantive* provisions of California's UCL, Cal. Bus. & Prof. Code §17200 *et seq.*, absent class members need not prove that they suffered injury in fact or lost money or property as a result of unfair competition. Specifically, while the representative plaintiff must meet Section 17204's standing requirements, under Section 17203, the remaining members of the class need not. *See In re Tobacco II Cases*, 46 Cal. 4th at 315-16, 320. Thus. . . . no class-wide proof of *any injury* need be shown to obtain class-wide restitution under Section 17203."

Why This is a Misstatement: Plaintiffs represent that the portion of the *Tobacco II* holding requiring only the representative plaintiff of a UCL class to have standing is one of substantive law. But the

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court's determination hinged on state class certification procedures, such as ascertainability and typicality, which are inapplicable in federal court under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), because Rule 23 has occupied the field. This was explained in Justice Baxter's dissent where he explained "[a]scertainability and typicality both require that members of a certified class themselves have causes of action against the defendant . . . the definition of a class cannot be so broad as to include persons who would lack standing to bring suit in their own names." (*Tobacco II Cases*, 46 Cal. 4th at 331 (Baxter, J., concurring and dissenting).) Rule 23 governs typicality in federal court.

OBJECTION to Plaintiffs' Citation to *Yokoyama v. Midland Nat'l Life Ins. Co.*: Misstates the Case

Plaintiffs' Citation at Page 12, lines 9–12: "[T]he Ninth Circuit recently reiterated that federal courts *must* apply substantive state law, such as the presumptions here regarding antitrust injury (or impact), especially when making a certification determination for a consumer class under Rule 23." (citing *Yokoyama v. Midland Nat'l Life Ins. Co.*, __F.3d__, No. 07-16825, 2009 WL 2634770 (9th Cir. Aug. 28, 2009) (emphasis in Plaintiffs' brief).

Why This is a Misstatement: *Yokoyama* does not address any presumptions, let alone hold that state presumptions apply in federal court. In *Yokoyama*, the court merely addressed the substantive elements of a deceptive practices claim under Hawaii's Deceptive Practices Act. (*Yokoyama v. Midland Nat'l Life Ins. Co.*, __F.3d__, No. 07-16825, 2009 WL 2634770, at *4–5 (9th Cir. Aug. 28, 2009).)

OBJECTION to Plaintiffs' Citation to *In re Methionine Antitrust Litig.*: Misstates the Case

Plaintiffs' Citation at Page 13, lines 13–18: "[I]n *In re Methionine Antitrust Litig.*, Judge Breyer . . . certified the indirect purchaser class even though the methionine market 'involves multiple sellers, a myriad of distribution channels and hundreds of different products,' and even though many 'end

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users . . . purchased products containing very little methionine.'" (citing 2003 WL 22048232, at *3, *5 (N.D. Cal. Aug. 22, 2003).)

Why This is a Misstatement: The reference to *Methionine* is incorrect and misleading because in that opinion Judge Breyer, decertified, rather than certified the class. The court explained that "the methodology [plaintiffs' expert] ultimately employed, however, does not take any of [the complexities of the industry] into account. Accordingly, [the plaintiff] does not have a 'colorable' method for proving antitrust injury, and the extent of that injury, on a class-wide basis." (*Id.* at *5.)

Dated: September 29, 2009

Respectfully submitted,

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I, Patrick M. Ryan, hereby attest, pursuant to N.D. Cal. General Order No. 45, that the concurrence to the filing of this document has been obtained from each signatory hereto.

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